Hashim bin Abu Hassan (suing as the legal parent and dependant of Zahari bin Hashim, deceased) & Ors v Lee Cheng Chuan & Ors

HIGH COURT (MELAKA) — CIVIL APPEAL NO MT1–12–29 OF 2002
LOW HOP BING J
6 SEPTEMBER 2005

Civil Procedure — Appeal — Grounds for appeal — Whether finding of court contrary to matters pleaded by parties — Whether evidence adduced hearsay

This was an appeal by the appellants against the decision of the learned trial judge who had dismissed the appellants' claim with costs. The appellants' grounds for the appeal were: (i) the trial judge's finding was unsupportable as it being not pleaded by the parties; (ii) the evidence that the third defendant's vehicle was not involved in the accident was hearsay and should not be admitted as evidence; and (iii) the trial judge's finding was against the weight of evidence and therefore was open to the appellate court to interfere.

Held, dismissing the appeal with costs:

(1) The learned trial judge had arrived at a finding of facts within the parameters of the pleadings by which the parties were bound. Further, the finding of facts by the trial judge was amply justified by the evidence adduced before him and therefore did not warrant any appellate interference (see paras 18 and 27).

(2) The appellants' hearsay contention was non-existent and without merits as there was direct evidence from the third defendant that his vehicle was not involved in the accident. Further, the appellants' submission in relation to hearsay evidence based on *Asiatic Development*, was misconceived as the instant appeal was not concerned with the application to adduce fresh evidence for use in the appeal (see paras 24–25); *Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy* [1995] 3 MLJ 445 distinguished.

[Bahasa Malaysia summary

Ini merupakan rayuan dari perayu-perayu terhadap keputusan yang arif hakim bicara yang menolak tuntutan perayu-perayu dengan kos. Alasan-alasan rayuan adalah seperti berikut: (i) keputusan hakim bicara tidak boleh disokong kerana ianya tidak diplid oleh pihak-pihak; (ii) keterangan mengenai kenderaan defendan ketiga tidak terlibat dengan kemalangan adalah dengar cakap dan tidak wajar diterima sebagai keterangan; dan (iii) keputusan hakim bicara adalah bertentangan dengan berat keterangan dan oleh yang demikian ianya terbuka kepada mahkamah rayuan untuk campur tangan.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Hakim bicara telah mencapai pendapat fakta dalam lingkungan pliding-pliding yang mana pihak-pihak telah terikat. Selanjutnya, keputusan fakta hakim bicara telah cukup dijustifikasikan oleh keterangan yang dikemukakan di hadapannya dan oleh yang demikian tidak memerlukan campur tangan dari bidang kuasa rayuan (lihat perenggan 18 dan 27).

(2) Dakwaan perayu-perayu berhubung dengan dengar cakap tidak wujud dan tidak bermerit kerana terdapat keterangan terus dari defendan ketiga yang bahawa kenderaannya tidak terlibat dengan kemalangan. Selanjutnya, hujahan-hujahan perayu-perayu berhubung dengan dengar cakap berdasarkan kes *Asiatic Development*, adalah silap kerana rayuan semasa bukannya berhubung dengan permohonan untuk mengemukakan keterangan baru untuk digunakan di dalam rayuan (lihat perenggan 24–25); *Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy* [1995] 3 MLJ 445 dibeza.]

Notes

For cases on grounds of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 936–939.

Cases referred to

Ah Sin dan lain-lain lwn Tan Tean Siang dan satu lagi [1993] MLJU 326 (refd)
Anamaly @ Anamalai a/l Mayivin lwn Lim Ah Leak dan lain-lain [2002] 7 MLJ 462 (refd)
Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy [1995] 3 MLJ 445 (distd)
Azri Shahimi bin Abd Karim & Anor v Azman bin Jantan [2003] 6 MLJ 713 (refd)
Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3) [1999] 6 MLJ 589 (refd)
Krishna Murthey & Anor v Law Lye Chua [1992] 1 CLJ 684 (refd)
Lai Yew Seong v Chan Kim Sang [1987] 1 MLJ 403 (refd)
Perbadanan Pembangunan Bandar v Goh Seng Hee [1998] MLJU 199 (refd)
Sepang Omnibus Sdn Bhd v Christina Loh Soo Pang & Ors [1970] 2 MLJ 234 (refd)
Tabarani b Mohd Arsad & Anor v Chan Tenn Yeu [1999] MLJU 126 (refd)
Zulsafari bin Ab Ghani & Anor v Shahril bin Idris [2002] 7 MLJ 436 (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3A)
Evidence Act 1950 s 101

M Sooriabalan (G Dorai & Co) for the plaintiffs.
SC Lim (SN Fam & Co) for the first and second defendants.
N Ganesh (VP Nathan & Partners) for the third defendant.
Mohd Fuad Hashim (Othman Hashim & Co) for the fifth defendant.

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellants/plaintiffs ('the plaintiffs') against the decision of the learned sessions court judge ('the trial judge') who had on 28 June 2002 dismissed the plaintiffs' claim with costs. The first and second plaintiffs' claim was filed under ss 7 and 7(3A) of the Civil Law Act 1956, while the third plaintiff's claim was for her own personal injury.

[2] This appeal is against liability and quantum in relation to a motor vehicle accident.

Finding of facts

[3] The first and second plaintiffs are the lawful parents of the deceased Zahari bin Hashim who was at the material time riding his motorcycle bearing registration No MN 8434, while the third plaintiff was the pillion rider.

[4] For brevity and convenience, all respondents are referred to as defendants.

[5] The first defendant was the driver of motorcar bearing registration No BEF 8566 with the permission of the owner, the second defendant. The third defendant was the driver of motorcar No FDD 7946 while the fourth defendant was the driver of motor lorry MAH 926 as an agent of the fifth defendant.

[6] The third plaintiff testified that on 19 April 1997, the deceased who was her brother was riding the motorcycle on which she was a pillion rider, from their house in Kampong Londang Masjid Tanah to their grandmother's house, proceeding towards the direction of Pengkalan Balak. At Batu 19 1/2, Kg Londang, they were trailing behind the first defendant's motorcar BEF 8566 for about 1/2km when the deceased overtook motorcar BEF 8566, in the process of which the deceased collided with the offside of motorcar BEF 8566. Both the deceased and plaintiff fell to the right side of the road beyond the centre white line. Meanwhile, an oncoming lorry MAH 926 driven by the fourth defendant collided with them, thereby causing the death of the deceased, and serious injury to the third plaintiff.

[7] The first defendant gave evidence that he was driving motorcar BEF 8566 from Melaka to Tanjong Bidara in the same direction as the deceased's motorcycle. At the place of the accident, motorcar FDD 7946 driven by the third defendant was coming out of a left lane about 20 to 30 feet away from the first defendant's motorcar. The first defendant also saw motor lorry MAH 926 coming from the opposite direction. The first defendant then slowed down his car. At that moment, he heard a loud bang emanating from behind his car. Through the rear view mirror, the first defendant saw the deceased and the third plaintiff had been thrown off their motorcycle onto the

right side of the road. The first defendant believed that the oncoming lorry had collided with the motorcyclist and his pillion rider.

[8] The investigating officer (SP1) and the third defendant also confirmed the above version of the accident. The third efendant further testified that his vehicle was not involved in the accident.

[9] As the fourth defendant had passed away before he could testify in the trial court, parties had agreed to rely on the fourth defendant's report which he had lodged with the police. In essence, that report stated that the accident had occurred on the fourth defendant's right of way.

[10] On the above evidence, the trial judge attributed no liability to the first, third and fourth defendants and held that the deceased had wholly contributed to and was the sole cause of the accident, as a result of which the plaintiffs' claim was dismissed with costs.

Alleged errors

[11] Mr M Sooriabalan, plaintiffs' learned counsel, submitted that:

(1) the trial judge's finding is unsupportable, being not pleaded by the parties, citing *Tabarani b Mohd Arsad & Anor v Chan Tenn Yeu* [1999] MLJU 126 (HC); *Dato' Abdullah Hishan bin Haji Mohd Hashim v Sharma Kumari Shukla (No 3)* [1999] 6 MLJ 589 (HC); and *Perbadanan Pembangunan Bandar v Goh Seng Hee* [1998] MLJU 199 (HC);

(2) The evidence that the third defendant's vehicle was not involved in the accident was hearsay and should not be admitted as evidence, referring to *Asiatic Development Bhd & Anor v Balachandar a/l Palanysamy* [1995] 3 MLJ 445 (CA); and

(3) the trial judge's finding is against the weight of evidence and it is open to the appellate court to interfere, on the basis of *Anamaly @ Anamalai a/l Mayivin lwn Lim Ah Leak dan lain-lain* [2002] 7 MLJ 462 and*Zulsafari bin Ab Ghani & Anor v Shahril bin Idris* [2002] 7 MLJ 436.

[12] The first and second defendants' learned counsel Mr SC Lim contended that the trial judge's finding is correct as the plaintiffs' had failed to prove negligence against the defendants, on the basis of *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403 (SC); *Sepang Omnibus Sdn Bhd v Christina Loh Soo Pang & Ors* [1970] 2 MLJ 234 (FC); *Ah Sin dan lain-lain lwn Tan Tean Siang dan satu lagi* [1993] MLJU 326 (HC); and *Krishna Murthey & Anor v Law Lye Chua* [1992] 1 CLJ 684 (HC).

[13] For the third defendant, learned counsel Mr N Ganesh, argued that the evidence clearly showed that the third defendant was not involved in the accident and this finding should not be disturbed on appeal. Support was sought in *Azri Shahimi bin Abd Karim & Anor v Azman bin Jantan* [2003] 6 MLJ 713 (HC).

A

[14] The fifth defendant's learned counsel Mr Mohd Fuad Hashim stressed that there was no error in the trial judge's finding.

[15] I shall first consider the pleading point.

B

[16] Upon a proper perusal of the elaborate pleadings of the parties as found in the appeal record, it is abundantly clear to me that the first and second defendants in, inter alia, para 4 of their defence had put the plaintiffs to strict proof of the plaintiffs' claim, while para 1 of the third defendant pleaded the same, so did the fourth and **C** fifth defendants in para 1 of their defence.

[17] It is trite law that in a motor vehicle accident such as in the instant appeal, the plaintiffs who allege negligence against the defendants must discharge the burden of proving negligence on a balance of probabilities: see s 101 Evidence Act 1950; *Ah Sin* **D** per Rahmah Hussain JC (later FCJ); and *Krishna Murthey* at p 686 per KC Vohrah J (later JCA).

[18] I am of the view that in evaluating the evidence adduced before him, the learned trial judge has arrived at a finding of facts within the parameters of the **E** pleadings by which the parties are bound.

[19] Hence, where eg in *Tabarani Mohd Arsad*, the sessions court was faced with two conflicting versions of the accident, Abdul Malik Ishak J held that the trial court should consider the probable version within the scope of the pleadings.

F

[20] For purposes of completeness, it is now appropriate for me to consider the authorities cited for the plaintiffs in order to determine their support for the plaintiffs' case.

G **[21]** The issues pertaining to the law of contract in *Dato Abdullah Hishan* do not have anything to do with the issues in this appeal which arose out of a motor vehicle accident.

[22] In *Perbadanan Pembangunan Bandar*, the learned magistrate had dismissed **H** the appellant's claim based on the submissions of the respondent and not on evidence. Abdul Kadir Sulaiman J (now FCJ) in allowing the appeal held, inter alia, that such submissions are not evidence.

[23] In my view, none of the above two authorities could lend any support to the plaintiffs' contention.

I

[24] Next, the issue of hearsay. The plaintiffs' submission in relation to hearsay evidence based on *Asiatic Development* is misconceived as the Court of Appeal there was concerned with the application to adduce fresh evidence for use in the appeal, and was not asked to determine any issue of hearsay evidence.

[25] In any event, it is to be noted that the plaintiffs' hearsay contention is without merits as there was direct evidence from the third defendant that his vehicle was not involved in the accident. With due respect to plaintiffs' learned counsel, the issue of hearsay evidence is non-existent.

[26] The trial judge's finding is essentially a finding of facts which would only justify appellate interference where eg the finding is against the weight of evidence: see *Anamaly* per VT Singham JC (now J); or where the trial judge failed to give reasons as to why he chose to disregard important evidence: see *Zulsafari* per Su Geok Yiam JC (now J).

[27] In the instant appeal, I find that the finding of facts by the trial judge is amply justified by the evidence adduced before him and so does not warrant any appellate interference: see eg my judgment in *Azri Shahimi* and the cases cited therein at pp 717E–718D.

Conclusion

[28] On the foregoing grounds, I hold that the trial judge has occasioned no error when he dismissed the plaintiffs' claim. I therefore affirm his decision and dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by I Izzuddin